

Because the Administrative Law Judge found the death of Korby Vance Anderson did not result from an accident that arose out of and in the course of his employment with the respondent, the Administrative Law Judge denied claimant's request for benefits. The claimants request the Appeals Board to review that finding. That is the sole issue now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The decision of the Administrative Law Judge should be reversed.

The decedent, Korby Vance Anderson, was killed as a result of a truck accident that occurred on April 5, 1993, while he was driving to a highway construction project north of Topeka on Highway 75. The parties stipulated to the relationship of employer/employee. The only issue to be determined in this review is whether the truck accident arose out of and in the course of decedent's employment with the respondent.

Claimants bear the burden of proof to establish their claim. "Burden of proof" is defined in K.S.A. 1992 Supp. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is

" . . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 1992 Supp. 44-501(a).

In order to recover, claimants must establish that the decedent sustained an accident and injury arising out of the employment and in the course of the employment. These are separate elements which must be proven in order for the claim to be compensable. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973). In order to establish that the incident "arose out of the employment," the claimant must show that there is some causal connection between the accident, injury and the employment. To do this, it must be shown that the injury arose out of the nature, conditions, obligations and incidents of the employment. Only risks associated with the work place are compensable. "In the course of the employment," relates to the time, place and circumstances under which the accident occurred, and that the injury happened while the employee was at work at his or her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

The Appeals Board finds it is more probably true than not that the decedent's truck accident and resulting death arose out of and in the course of his employment with the respondent. The Appeals Board finds one of decedent's daily job duties was to pick-up the truck and equipment owned by BAS Construction and deliver it to the work site where it was regularly used by decedent's crew to construct concrete culverts. Although it is true decedent was part owner of BAS Construction which was to receive payment based upon the amount of concrete used to construct the culverts, that fact is not determinative of the issue of whether decedent's accident arose out of and in the course of his employment.

The Appeals Board finds decedent's job duties included, on a daily basis, both the operation of equipment at the job site and the delivering of the necessary equipment to the job site. At the time of the accident, the decedent had picked up the BAS truck and equipment at the BAS shop where they had been stored for safe keeping and was driving to the highway construction site. At the time of the accident, decedent's crew was waiting for some of the equipment in the truck in order to begin work. Based upon this evidence, the Appeals Board finds decedent's accident arose out of and in the course of his employment with the respondent. Although respondent argues the transportation of the tools and equipment was merely incidental to claimant's going to the job site, the Appeals Board disagrees and finds the transportation of the equipment an integral part of the decedent's job. Therefore, the Appeals Board finds the transportation of the equipment to the job site was causally related to decedent's employment and that decedent was "at work" and thus "in the course of" his employment for the respondent at the time the accident occurred. Claimant was performing an assigned duty at the time of the accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge James R. Ward dated June 27, 1994, is reversed.

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR OF THE claimants, Cheryl K. (Clark) Anderson, as surviving spouse, and Mary Elizabeth Clark (Anderson), minor dependent, and against the respondent, Sherwood Construction Co. Inc., and the insurance carrier, St. Paul Fire & Marine Ins. Co., for an accidental injury which occurred on April 5, 1993, and based on an average weekly wage of \$550.00, for compensation at the rate of \$299.00 per week from April 5, 1993.

Subject to the provisions below and K.S.A. 1992 Supp. 44-510b, one-half of the payment shall be paid to Cheryl K. Anderson, the surviving spouse, and one-half to the conservator of Mary Elizabeth Clark, the minor dependent, until she reaches 18 years of age. After that date the minor dependent will continue to receive payment until she reaches twenty-three (23) years of age only if she is enrolled as a full-time student in an accredited institution of higher education or vocational education, or if she is physically or mentally unable to earn wages in any type of substantial or gainful employment.

Should the surviving spouse remarry, from the date of the remarriage the entire weekly payment is to be paid to the conservator of the minor dependent, or the dependent herself if she has reached the age of majority. In addition, the surviving spouse is entitled to a lump sum amount equivalent to 100 weeks of benefits, subject, of course, to the maximum amount of compensation payable, whereupon her rights to benefits terminate.

Should benefits cease that were otherwise payable to the minor dependent, the entire weekly payment shall be made to the surviving spouse, if her right to benefits has not otherwise terminated.

For the period from April 5, 1993 to May 19, 1995, Cheryl K. Anderson is entitled to \$149.50 per week for 110.71 weeks, or \$16,551.15, which is currently due and owing, less

amounts previously paid. Thereafter, payment is to be made to the surviving spouse as provided above.

For the period from April 5, 1993 to May 19, 1995, Mary Elizabeth Clark is entitled to 110.71 weeks at the rate of \$149.50 per week, or \$16,551.15, which is currently due and owing, less amounts previously paid. Thereafter, payment shall continue as provided above.

Notwithstanding language to the contrary, the maximum amount of compensation payable to decedent's dependents shall not exceed \$200,000 and when such total amount has been paid the liability of the employer for any further compensation under K.S.A. 1992 Supp. 44-510b to dependents, other than the minor dependent of the decedent, shall cease, except that the payment of compensation to any minor dependent of the employee shall continue for the period of the child's minority at the weekly rate in effect when the employer's liability is otherwise terminated and shall not be subject to termination until such child becomes eighteen years of age.

The respondent and insurance carrier are ordered to pay or reimburse claimants the maximum sum of \$3,200.00, for funeral expenses incurred and pay the medical expense incurred, less amounts previously paid under this claim for workers compensation benefits or amounts subject to credit pursuant to K.S.A. 1992 Supp. 44-504(b).

The remaining orders of the Special Administrative Law Judge contained in the Award of June 27, 1994, are adopted and incorporated herein by reference to the extent they are not inconsistent with the orders of the Appeals Board set forth above.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 1992 Supp. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid directly as follows:

Appino & Achten Reporting Service	\$351.60
Correll Reporting Service	\$636.50
Curtis, Schloetzer, Hedberg, Foster & Associates	\$199.10

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, Kansas
Ronald J. Laskowski, Topeka, Kansas
James R. Ward, Administrative Law Judge
George Gomez, Director